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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 343

JOSEPH H. CUDIA and JOHN TURNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph H. Cudia and John Turner, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 18, 1965.

CITATION TO OPINION BELOW.

The opinion of the Court of Appeals, printed in Appendix B hereto, infra, page 6a, is reported in ..... F. 2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on May 18, 1965 (Appendix C, infra, page 10a). Rehearing was denied on June 15, 1965 (Appendix D, infra, page 11a). The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the indictment states facts sufficient to constitute an offense against the United States.

2. Whether petitioners were entitled to a bill of particulars.

3. Whether the withholding by the government of a complete list of witnesses violated the constitutional rights of petitioners.

4. Whether the motion to suppress evidence acquired by an unreasonable search and seizure should have been granted.

5. Whether petitioners had a fair trial.

STATUTES INVOLVED.

The statutory provisions involved are 18 U. S. C. Section 371, and 26 U. S. C. Sections 5601 and 5602. They are printed in Appendix A hereto, infra, pages 1a-5a.

STATEMENT OF THE CASE.

This is a criminal action.

Petitioners were indicted on October 3, 1963, by the grand jury at Chicago, Illinois, for the offense of conspiracy to commit certain offenses against the United States.

The indictment, consisting of one count, is, as follows:

The September 1963 grand jury charges: That on or about March 7, 1963, and continuing through April 6, 1963, Joseph H. Cudia and John Turner, defendants herein, did, within the Northern District of Illinois, Western Division, unlawfully, knowingly, wilfully and feloniously conspire and combine, confederate and agree together and with each to commit certain offense against the United States, to-wit: have in their possession and custody and under their control an unregistered still and unregistered distilling apparatus set up, in violation of Title 26, Section 5601(a)(1), United States Code; engage in the business of an unregistered distiller, in violation of Title 26, Section 5601(a)(2), United States Code; carry on the business of an unbonded distiller, in violation of Title 26, Section 5601(a)(4), United States Code, make and ferment mash for distillation and production of distilled spirits on unauthorized premises, in violation of Title 26, Section 5601(a)(7), United States Code; produce distilled spirits not as authorized distillers, in violation of Title 26, Section 5601(a)(8), United States Code; attempt to defraud the United States of tax due on distilled spirits while engaging in and carrying on the business of distillers, in violation of Title 26, Section 5602, United States Code.

The grand jury further charges that at or about the time hereinafter set forth, in furtherance of, in the execution of, and for the purpose of carrying into effect the object, design and purpose of the said conspiracy, the defendants hereinafter named, did do and perform the following overt acts:

1. On or about March 7, 1963, Joseph H. Cudia went to 907 S. Main Street, Rockford, Illinois;

2. On or about March 22, 1963, John Turner signed the name "Art Turner" on Receipt No. N 36026 of Skelly Oil Company;

3. On or about March 21, 1963, Joseph H. Cudia went to 907 S. Main Street, Rockford, Illinois;

in violation of Section 371, Title 18, United States Code.

A true bill.

Anna R. Lehmann
Foreman

James P. O'Brien

United States Attorney (R. 5-6.)

Petitioner, Joseph H. Cudia, filed a surety bond in the sum of $1,000 which was approved on October 21, 1963. (R. 8.) He entered a plea of not guilty. (R. 9.)

Entry of appearance of John R. Snively as attorney for petitioner, John Turner, was filed on October 22, 1963. (R. 11.) He entered a plea of not guilty. (R. 13.)

Petitioner, John Turner, filed on October 22, 1963, a motion to dismiss the indictment. (R. 12.) It was heard and denied. (R. 13.)

Entry of appearance of B. Jay Knight as attorney for petitioner, Joseph H. Cudia, was filed on October 30, 1963. (R. 16.)

His motion to dismiss the indictment was heard and denied. (R. 19.)

Petitioner, John Turner, filed on October 30, 1963, a motion for discovery and inspection. (R. 17.)

He also filed a motion for a bill of particulars. (R. 18.)

His motion is, as follows:

The defendant, John Turner, moves the court to direct the filing of a bill of particulars as follows:

1. The names of all parties to the alleged conspiracy.

2. The dates and places of the alleged conspiracy.

3. The acts and declarations of the parties in furtherance of the alleged conspiracy.

An answer to the motion for bill of particulars was filed by the government on November 13, 1963. (R. 25-29.)

Petitioner, John Turner, filed on November 29, 1963, a motion for a complete list of witnesses. (R. 30.)

The motion for bill of particulars was heard and denied on November 29, 1963. (R. 31.) The motion for complete list of witnesses was also heard and denied.

Leave was given petitioner, John Turner, to file a surety bond to replace his cash bond. (R. 31.) A surety bond was filed. (R. 32.)

Petitioner, John Turner, filed on July 6, 1964, a motion to dismiss the indictment. (R. 34.) It was the same as his former motion.

He also filed a motion to suppress evidence. (R. 35.)

His motion is, as follows:

The defendant, John Turner, moves the court to direct that certain property, consisting of 1000 gallons of mash in 20 50-gallon drums, 30 gallons of the finished product, 100 pounds of wheat, 100 pounds of sugar, 2 20-gallon crocks, 1 cooker for cooking mash, 1 55-gallon cooler drum, and about 100 empty gallon jugs, which was unlawfully seized and taken from a certain building on Cunningham Road near Pierpont Avenue at Rockford, Illinois, by Mike Iasparro, Joe Mandell, Eugene Ebens, and Eugene Graham, Deputy Sheriffs of Winnebago County, in the early morning of April 6, 1963, and all testimony relative thereto, and any photographs thereof, be suppressed as evidence against him.

He states that the property was seized without a search warrant.

The motion to dismiss the indictment was denied on July 13, 1964. (R. 36.) The motion to suppress evidence was ordered to be considered with the evidence during the course of the trial.

The trial was held before the Honorable J. Sam Perry, Judge, and a jury, on July 13, 14, 15, 16 and 17, 1964.

The motion of petitioner, John Turner, to suppress evidence was renewed and denied on July 14, 1964. (R. 37.)

In the order named, Charles Richard Meehan, Carl B. Hambach, Burton W. Rehn, Eugene L. Ebens, Mike Isaparro, Walter Yates, Robert A. Woodruff, Wilbur L. Tucker, Edwin Norman Schaye, Roy Schroeder, Jim Warring, Willie Fredd, Mary E. Myers, Donald Anderson, Donald Vaughn, Robert James Dytrych, and Howard C. Doulder, testified for the prosecution.

Motions of petitioners, at the close of respondent's case, for judgment of acquittal were filed, heard and denied on July 15, 1964. (R. 40.)

In the order named, Rev. John Tigner, Lloyd Clark, Floyd Campbell, Joseph Howard Cudia, Anne Martegani, and Edna Cudia, testified for petitioner, Joseph H. Cudia.

The prosecution introduced evidence in rebuttal.

In the order named, Patrick Huffman, Carl B. Hambach, and Robert J. Dytrych, testified.

Motions by petitioners, at the close of all the evidence, for judgment of acquittal were filed, heard and denied on July 16, 1964. (R. 43.)

The jury returned separate verdicts of guilty on July 17, 1964. (R. 45-46.)

The cause was continued to July 20, 1964, for disposition.

The District Court imposed sentence on July 20, 1964. (R. 47-48.)

Petitioners were committed to the custody of the Attorney General for a period of five years, to serve the first six months and be placed on probation for the remainder of the five year term. Fines of $1,000 and costs were imposed, to be paid under the supervision of the probation officer. The bonds were ordered to stand as appeal bonds. Leave was given to petitioners to file motions for new trial within 10 days.

Judgment and commitment orders, and judgment and orders for probation, were entered on July 20, 1964. (R. 57-60.)

Petitioner, John Turner, filed on July 27, 1964, a motion for new trial, or in the alternative, judgment of acquittal. (R. 61-64.)

Petitioner, Joseph H. Cudia, filed on July 27, 1964, a motion for new trial. (R. 65-67.)

The motions were denied on July 28, 1964. (R. 68-69.)

Notice of appeal was filed by petitioners on August 6, 1964. (R. 71-73.)

Leave was given by the court below to dispense with the printing of the appendix on November 25, 1964.

FACTS.

In the early morning of April 6, 1963, a building on Cunningham Road, near South Pierpont Avenue, Rockford, Illinois, was searched by Winnebago County Officers without a warrant. (R. 207-212.) In the building was discovered a still, mash, liquid, a cooler, sugar, crocks and glass jugs which were seized. The still was still warm. (R. 215.) The building had been under surveillance. (R. 208.)

The property was owned by Joseph H. Cudia, but he had rented the building to Scott Dullard, of Chicago, Illinois. (R. 210.) Mr. Cudia had purchased from Mott Bros. Co., of Rockford, Illinois, certain asbestos cement and copper tubing and fittings which were to be used at

his home and elsewhere, but they were not used in the building where the still was discovered. (R. 665-668.) Floyd Campbell used the asbestos to repair the furnace in his home. (R. 581-588.) The copper tubing and fittings were introduced in evidence by him.

It was charged that John Turner signed the name, Art Turner, to a certain receipt of Skelly Oil Company for a 500-gallon gas tank which was delivered to the building by Roy Schroeder (R. 315), but the person that signed the receipt did not accompany him there. (R. 334.) He was not sure of the identity of the person that signed the receipt. (R. 335.)

Howard C. Doulder, an examiner of questioned documents (R. 487), but employed by the government, testified that he made an examination and comparison of the questioned signature "Art Turner" with the known handwriting of John Turner and it was his opinion that they are the handwriting of one and the same person. (R. 507.)

Mr. Cudia testified that he did not conspire with Mr. Turner to commit any offense against the United States. (R. 686.) He also testified that he had not requested or solicited him to obtain a 500-gallon gas tank. He knew nothing about it. (R. 687.)

REASONS FOR GRANTING THE WRIT.

1. The petitioners were denied their constitutional right to be informed of the nature and cause of the accusation.

In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. (U. S. C. A. Const. Amend. 6.)

The indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U. S. C. A.)

The statute creating the offense alleged in the indictment is, as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> 18 U. S. C. A. Sec. 371.

Clearly, it is not sufficient to allege the offense in the language of the statute. While the offense to be punished may be set forth with sufficient definiteness and certainty in the statute to satisfy constitutional requirements, it does not follow that an indictment in the language of the statute is sufficient to inform the accused of the nature and cause of the accusation, or to state an offense punishable under the statute, as required by the Constitution. Rather, where the statute does not define or describe the act or acts constituting the offense

created, they must be specifically alleged. Facts and not conclusions must be alleged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U. S. C. A.) Here, the facts are lacking. The indictment should have set forth the nature and elements of the offense charged. It should also have stated the time and place of the offense as definitely as can be done.

Taking up the overt acts alleged in the indictment, we discover that they are vague, indefinite and uncertain. They do not disclose any facts showing any connection between the overt acts and the object of the conspiracy. It is true, as the court said in *Yates* v. *United States,* 354 U. S. 298, 334:

> "* * * It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. *Pierce* v. *United States,* 252 U. S. 239, 244; *United States* v. *Rabinowich,* 238 U. S. 78, 86. Nor, indeed, need such an act, taken by itself, even be criminal in character. *Braverman* v. *United States,* 317 U. S. 49. The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' ***."

The connection, however, must be made to appear specifically. (See *United States* v. *Kensil,* 295 F. 2d 489.)

In the consideration thereof, we have made a diligent search but we have not found a case which is squarely in point one way or the other. Perhaps one reason for the inability to find such a case is that it appears from the decisions that throughout the years draftsmen of indictments have made it a practice to allege the facts in greater detail. It should be kept in mind in this connection that an accused is presumed to be innocent until proven guilty, and that an indictment must be tested upon a presumption that the accused had no knowledge

of the facts charged against him. (*White* v. *United States*, 10 Cir., 67 F. 2d 71.) It is also significant that the government has not cited a single case which is in point.

The indictment is the most defective that appears in the reported cases. Clearly, it is void. The motion to dismiss the indictment should have been allowed.

There was a denial of due process of law.

2. To prepare the defense, a bill of particulars was required.

It is believed that the record shows that petitioners were taken by surprise at the trial and that their substantial rights were prejudiced by the lack of a bill of particulars. If it does not, it should.

In *United States* v. *Smith*, 16 F. R. D. 372, 374, District Judge Charles E. Whitaker, later a member of this court, said:

> "Certainly the fact that an indictment or information conforms to the simple form suggested in the rules is no answer or defense to a motion for a bill of particulars under Rule 7 (f). Rule 7 (f) necessarily presupposes an indictment or information good against a motion to quash or a demurrer. Its proper office 'is to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial', and when necessary for those purposes, is to be granted even though it requires 'the furnishing of information which in other circumstances would not be because evidentiary in nature', and an accused is entitled to this 'as of right'. *U. S.* v. *U. S. Gypsum*, D. C., 37 F. Supp. 398, 402. To the same effect are *Singer* v. *U. S.*, 3 Cir., 58 F. 2d 74, *U. S.* v. *Allied*

Chemical & Dye Corp., D. C. 42 F. Supp. 425, 428; *Fontana* v. *U. S.*, 8 Cir., 262 F. 283. It seems quite clear that where charges of an indictment are so general that they do not sufficiently advise defendant of the specific acts with which he is charged, a bill of particulars should be ordered.' Cases cited and *U. S.* v. *Grosman*, D. C., 55 F. 2d 408; *Chew* v. *U. S.*, 8 Cir., 9 F. 2d 348, 353.

"This must necessarily be true when we realize that there is no discovery means in criminal cases, such as provided by the civil rules for civil cases, and that the only means open to a defendant, in a criminal case, for the securing of the details of the charge against him is that afforded by Rule 7 (f) of the Federal Rules of Criminal Procedure. 'Bills of particulars have grown from very small and technical beginnings into most important instruments of justice. * * * While they are not intended to advise a party of his adversary's evidence or theory, they will be required, even if that is the effect, in cases where justice necessitates it.'" *U. S.* v. *Balaban*, D. C., 26 F. Supp. 491, 499.

"Nor is it any answer to a motion for a bill of particulars for the government to say: 'The defendant knows what he did, and, therefore, has all the information necessary.' This argument could be valid only if the defendant be presumed to be guilty. For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges'. *Fontana* v. *U. S.*, 8 Cir., 262 F. 283, 286; *U. S.* v. *Allied Chemical & Dye Corp.*, D. C. 42 F. Supp. 425. This conclusion seems to me to be elementary, fundamental and inescapable."

Here, the indictment is vague, indefinite and uncertain. Petitioner, John Turner, moved the court to direct the

filing of a bill of particulars showing (1) the names of all parties to the alleged conspiracy, (2) the dates and places of the alleged conspiracy, and (3) the acts and declarations of the parties in furtherance of the alleged conspiracy.

The information sought was not within the knowledge of petitioners. They did not have an equal opportunity with the prosecution to discover the information. The information is not evident from an examination of the accusation as a whole. The information is not as to matters sufficiently described in the indictment. The information is not as to immaterial or irrelevant matters. It was indeed a reasonable request for information.

A bill of particulars was necessary to inform the accused of the nature and cause of the accusation, to avoid surprise, to enable them to prepare for trial, and to safeguard them from a subsequent prosecution for the same act or offense. (*Remmer* v. *United States,* C. A. Nev., 295 F. 2d 277, vacated on other grounds, 347 U. S. 227, 98 L. ed. 654, 74 S. Ct. 450, rehearing granted and remanded 348 U. S. 904, 99 L. ed. 710, 75 S. Ct. 288, affirmed 222 F. 2d 720.)

Clearly, good cause was shown. It was an arbitary abuse of discretion for the District Court to deny the motion.

Again, there was a denial of due process of law.

3. Justice required that the accused be furnished with a complete list of witnesses.

In Illinois, it has long been the practice in the state courts to require the State to furnish the accused with a complete list of witnesses. The new Code of Criminal Procedure of 1963 provides that on motion of the de-

fendant the court shall order the State to furnish the defense with a list of prosecution witnesses and their last known addresses. (Ill. Rev. Stat. 1963, Chap. 38, Sec. 114-9.)

The Federal Rules of Criminal Procedure make no provision for a similar motion. The District Court, however make no provision for a similar motion. The District Court, however, has inherent power to require the government to furnish the accused with a complete list of witnesses. It should have done so. (Here, there were 18 witnesses that testified for the prosecution.)

In *Brady* v. *Maryland,* 373 U. S. 83, 10 L. ed. 2d 215, 83 S. Ct. 1194, 1197, the court said:

> "The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md. at 427, 174 A. 2d, at 169."

The suppression or withholding by the government of evidence favorable to an accused, or a complete list of

witnesses on request, as in this case, violates the Due Process Clause of the 14th Amendment to the Constitution of the United States. (*Brady* v. *Maryland, supra, Jencks* v. *United States,* 353 U. S. 657, 1 L. ed. 2d 1103, 77 S. Ct. 1007.)

Again, there was a denial of due process of law.

4. Evidence acquired by an unreasonable search and seizure is not admissible.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U. S. C. A. Const. Amend. 4.)

"* * * nor shall (any person) be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *." (U. S. C. A. Const. Amend. 5.)

Here, a search and seizure was made without a warrant. A timely motion to suppress the evidence was made by petitioner, John Turner. The motion was ordered to be considered with the evidence during the course of the trial.

At the trial, certain property so seized without a warrant was introduced by the prosecution, together with testimony relative thereto, and photographs thereof. The motion was renewed, but it was denied.

Petitioner did not claim ownership or possession of the premises searched or property seized. Where a showing of interest in seized property would also convict,

there is no necessity to show an interest in the premises searched or the property seized. (*Elkins* v. *United States,* 364 U. S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437, *Rios* v. *United States,* 364 U. S. 253, 4 L. ed. 2d 1688, 80 S. Ct. 1431.)

In its opinion, the court below said:

> "We think our holding in *United States* v. *Sferas,* 210 F. 2d 69, 74 (1954) is persuasive, where we said:
>
> '* * * where two persons have equal rights to the use or occupation of the premises, either may give consent to a search, and the evidence thus disclosed can be used against either. * * *' "

The holding may be persuasive, but it is not applicable to the instant case. There is absolutely no testimony showing that petitioners had equal rights to the use or occupation of the premises.

A waiver or consent must be proved by clear and convincing testimony. It must be established that there was no duress or coercion, actual or implied. The government must show a consent that is unequivocal and specific, and freely and intelligently given. (*Judd* v. *United States,* 190 F. 2d 649.)

Where one in custody peacefully submits to the demands of an officer to break the lock on a building, it is not a waiver of his constitutional rights. (*United States* v. *Slusser,* D. C. 270 F. 2d 816.)

Petitioner, Joseph H. Cudia, may have acquiesced in the search that was made of the premises, but this is not sufficient. (*United States* v. *Lantrip,* D. C. 74 F. Supp. 946.) He must consent to the same, but he did not do so. Although he was the landlord, he had no right to break into the premises occupied by his tenant. Likewise, he

had no right to consent to a search of the premises by the officers, or to authorize them to search the premises.

Clearly, the rights of petitioners against unreasonable search and seizure were violated. They were compelled to be witnesses against themselves. They were also deprived of their liberty without due process of law.

Evidence so acquired should be suppressed. (*Johnson* v. *United States,* 333 U. S. 10, 92 L. ed. 436, 68 S. Ct. 367.) The District Court erred in denying the motion to suppress evidence.

Again, there was a denial of due process of law.

5. There is no proof of a conspiracy or that petitioners are the persons who committed the offense, and the verdicts are not supported by substantial evidence.

In order to establish the offense of conspiracy charged in the indictment, the evidence must show beyond a reasonable doubt:

First, that the conspiracy described was formed and existed at or about the time alleged.

Second, that the accused knowingly and wilfully became a member of the conspiracy.

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time alleged.

Fourth, that such overt act, if any, was committed in furtherance of some object or purpose of the conspiracy as charged.

Here, leave was granted by the court below to dispense with the printing of the appendix. Although the transcript of proceedings is voluminous, little more than a

suspicion of guilt is raised by the evidence. It is not clear and convincing. Likewise, it is conflicting as well as weak and unsatisfactory.

The record shows that the prosecution failed to establish the offense of conspiracy charged in the indictment.

It also leaves a reasonable and well founded doubt that petitioners are the persons who committed the offense.

No testimony was introduced by the prosecution to show that petitioners conspired together to commit any offense against the United States. Petitioners were not shown to have at the time or place where, and at the time when, a still and distilling apparatus was set up without being registered, or the business of a distiller was engaged in or carried on, or where mash and ferment mash fit for distillation and the production of distilled spirits, was made, or such distilled spirits produced.

Petitioner, Joseph H. Cudia, was taken from his home by the officers to the site or place where a still or distilling apparatus was set up without being registered and had been in operation. He was then arrested. He was interrogated by the officers. An incriminating statement was elicited from him by them during accusatory interrogation. (R. 224.) He was not advised of his right to counsel or his right to remain silent. (*Escobedo* v. *Illinois,* 378 U. S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758, *Massiah* v. *United States,* 377 U. S. 201, 12 L. ed. 2d 246, 84 S. Ct. 1199.) He was charged with the operation of a still in a state court, but he was found not guilty. (R. 622-626.) He objected to the admission of the incriminating statement in the District Court, but it was admitted.

Petitioner, John Turner, was not arrested for any offense until he was indicted with petitioner, Joseph H. Cudia, for the offense of conspiracy.

Although the site or place had been under surveillance by the officers, there is absolutely no testimony that petitioners had been there.

A verdict cannot be permitted to stand where, as in this case, there exists a reasonable and well founded doubt of the guilt of petitioners.

Clearly, the want of evidence is fatal to the verdicts. A new trial should have been granted to petitioners because it was required in the interests of justice.

Again, there was a denial of due process of law.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

B. Jay Knight,
Anthony S. Ingrassia,
John R. Snively,
Counsel for Petitioners.

APPENDIX

A.

Statutes

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U. S. C. A. Sec. 371.

§ 5601. Criminal penalties.

(a) Offenses. Criminal penalties.

(1) Unregistered stills.—has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or

(2) Failure of distiller or rectifier to file application.—engages in the business of a distiller or rectifier without having filed application for and received notice of registration, as required by section 5171(a); or

(3) False or fraudulent application.—engages, or intends to engage, in the business of distiller, bonded

warehouseman, rectifier, or bottler of distilled spirits, and files a false or fraudulent application under section 5171; or

(4) Failure or refusal of distiller or rectifier to give bond.—carries on the business of a distiller or rectifier without having given bond as required by law; or

(5) False, forged, or fraudulent bond.—engages, or intends to engage, in the business or distiller, bonded warehouseman, rectifier, or bottler of distilled spirits, and gives any false, forged, or fraudulent bond, under subchapter B; or

(6) Distilling on prohibited premises.—uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits, or aids or assists therein, or causes or procures the same to be done, in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house (except as authorized under section 5178(a)(1)(C), or on board any vessel or boat, or on any premises where beer or wine is made or produced, or where liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under section 5178(b); or

(7) Unlawful production, removal, or use of material fit for production of distilled spirits.—except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualifed to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; or

(8) Unlawful production of distilled spirits.—not being a distiller authorized by law to produce distilled

spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material; or

(9) Unauthorized use of distilled spirits in manufacturing processes.—except as otherwise provided in this chapter, uses distilled spirits in any process of manufacture unless such spirits—

(A) have been produced in the United States by a distiller authorized by law to produce distilled spirits and withdrawn in compliance with law; or

(B) have been imported (or otherwise brought into the United States) and withdrawn in compliance with law; or

(10) Unlawful rectifying or bottling.—engages in or carries on the business of a rectifier, or a bottler of distilled spirits—

(A) with intent to defraud the United States of any tax on distilled spirits rectified or bottled by him; or

(B) with intent to aid, abet, or assist any person or persons in defrauding the United States of the tax on any distilled spirits; or

(11) Unlawful purchase, receipt, rectification, or bottling of distilled spirits.—purchases, receives, rectifies, or bottles any distilled spirits, knowing or having reasonable grounds to believe any tax due on such spirits has not been paid or determined as required by law; or

(12) Unlawful removal or concealment of distilled spirits.—removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or determined, from the place of manufacture or storage, or from any instrument of transportation, or conceals spirits so removed; or

(13) Creation of fictitious proof.—adds, or causes to be added any ingredient or substance (other than ingredients or substances authorized by law to be

added) to any distilled spirits before the tax is paid thereon, or determined as provided by law, for the purpose of creating fictitious proof; or

(14) Distilling after notice of suspension.—after the time fixed in the notice given under section 5221-(a) to suspend operations as a distiller, carries on the business of a distiller on the premises covered by the notice of suspension, or has mash, wort, or beer on such premises, or on any premises connected therewith, or has in his possession or under his control any mash, wort, or beer, with intent to distill the same on such premises;

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) Presumptions.—

(1) Unregistered stills.—Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site of place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(2) Failure or refusal of distiller or rectifier to give bond.—Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(3) Unlawful production, removal, or use of material fit for production of distilled spirits.—Whenever on trial for violation of subsection (2) (7) the

defendant is shown to have been at the place in the building or on the premises where such mash, wort, or wash fit for distillation or the production of distilled spirits, was made or fermented, and at the time such mash, wort, or wash was there possessed, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(4) Unlawful production of distilled spirits.— Whenever on trial for violation of subsection (a) (8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

Added Pub. L. 85-859, Title II, Sec. 201, Sept. 2, 1958, 72 Stat. 1398.

§ 5602. Penalty for tax fraud by distiller.

Whenever any person engaged in or carrying on the business of a distiller defrauds, attempts to defraud, or engages in such business with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, he shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. No discontinuance or nolle prosequi of any prosecution under this section shall be allowed without the permission in writing of the Attorney General. Added Pub. L. 85-859. Title II, Sec. 201, Sept. 2, 1958, 72 Stat. 1400.

26 U. S. C. A. Secs. 5601, 5602.

B.

Opinion

In the

United States Court of Appeals

For the Seventh Circuit

No. 14857 SEPTEMBER TERM, 1964 APRIL SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH H. CUDIA and
JOHN TURNER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

MAY 18, 1965

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Joseph H. Cudia and John Turner, defendants, appeal from their respective convictions by separate judgments entered on verdicts of a jury. They were tried upon an indictment charging a conspiracy, under 18 U.S.C.A. § 371, to have in their possession, custody and control an unregistered still, in violation of 26 U.S.C.A. § 5601 (a) (1) (2) (4) (7) and (8) and § 5602, and alleging two overt acts by Cudia and one overt act by Turner in the execution of the conspiracy.

1. Defendants assign as error the action of the district court in denying their motions to dismiss the indictment. They urge that the overt acts alleged are vague, indefinite and uncertain, under 18 U.S.C.A. rule 7 (c), and violate the sixth amendment of the federal constitution.

The government, while assuming for the sake of argument on this point that the second overt act (that by Turner) is insufficient to specify a jurisdictional location, insists that the remaining two acts are specific as to time

and place, under the authority of *De Lacey* v. *United States*, 9 Cir., 249 F. 625, 628 (1918). In *Yates* v. *United States*, 354 U.S. 298, 334, the court said:

> "* * * It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. *Pierce* v. *United States*, 252 U.S. 239, 244; *United States* v. *Rabinowich*, 238 U.S. 78, 86. Nor, indeed, need such an act, taken by itself, even be criminal in character. *Braverman* v. *United States*, 317 U.S. 49. The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' * * *."[1]

We agree with the government's contention and we find no error in this respect.

2. Defendants claim error in the district court's denial of Turner's motion for a bill of particulars. However, such a motion is addressed to the sound discretion of the court. *United States* v. *Ansani*, 240 F. 2d 216 (1957), cert. den. *sub nom Milner* v. *United States*, 353 U.S. 936. In *Wong Tai* v. *United States*, 273 U.S. 77, the court said, at 82:

> "* * * And there is nothing in the record indicating that the defendant was taken by surprise in the progress of the trial, or that his substantial rights were prejudiced in any way by the refusal to require the bill of particulars. See *Connors* v. *United States*, 158 U.S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U.S. 56, 84; *New York Central R. R.* v. *United States*, 212 U.S. 481, 497."

The indictment in the case at bar alleges the period of the conspiracy to be from March 7, 1963 to April 6, 1963 and the dates of the overt acts are within that general period. The record fails to show that defendants were taken by surprise at the trial or that their substantial rights were prejudiced in any way by the lack of a bill of particulars.

3. In their brief, appellants contend that the trial court erred in denying defendant Turner's motion for a complete list of witnesses. They rely on *Jencks* v. *United States*, 353 U.S. 657. However, we do not believe *Jencks*

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[1] A helpful collection of authorities is found in United States v. Gilboy, D.C. M.D. Pa., 160 F. Supp. 442 (1958).

is applicable to that contention. There is no showing that the government had a list of witnesses or that a situation arose to which the decision in *Jencks* would apply.

4. Defendant Turner filed a motion to suppress as evidence 1000 gallons of mash and certain products and material claimed to have been unlawfully seized without a search warrant, in violation of the fourth and fifth amendments to the federal constitution. Some of this evidence was introduced by the government at the trial, together with testimony relating thereto and photographs thereof. Thereupon the motion was renewed and denied.

However the government calls our attention to evidence in the record that Ebens, a government witness, who was a detective for the Winnebago County sheriff's office, testified that he and detective Graham saw a large gas tank sitting outside a building and that as they got close to the building they could smell mash. The detectives went to Cudia's house and picked him up. Cudia later that day told them he owned the building and rented it to a man known to him as Scott Dullard. Thereupon they went to the building in question and, when asked if he had a key, Cudia answered in the negative, that the rent had not been paid for the month of April and that the detectives should break the lock on the building. Cudia and two other detectives entered the building, where it was very warm and the smell of mash was very strong. Cudia went ahead and turned on the lights in the building. The men entered the basement and in front of them were 20 barrels of mash, a cooker, a cooler, sugar and crocks. Cudia then was placed under arrest and later he made and signed a written statement.

While in this court the argument that the trial court erred in denying a motion to suppress evidence appears in a brief filed by the attorneys for Turner as well as Cudia, it is clear that Cudia cannot assert this claim inasmuch as he authorized the detectives to break the lock and enter the premises where the illegal still was in operation. As to the objection of Turner to the failure of the trial court to suppress the evidence, we hold that his motion to suppress was properly denied by the district court. Certainly all searches without a warrant are not illegal.

Brinegar v. *United States,* 338 U.S. 160 (1949). The observation of gas tanks near the building housing the still and the detection of the odor of mash emanating from the building, followed by the disclaimer to the officers by the owner of an immediate possessory interest in the premises and the assertion of the landlord's right of re-entry amounted to an authorization to the officers to enter the building. We think our holding in *United States* v. *Sferas,* 210 F. 2d 69, 74 (1954) is persuasive, where we said:

> "* * * where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either. * * *"

5. In a general attack upon the facts revealed by the evidence in this case, defendants charge that there is no proof of conspiracy or of their identity as the persons charged, and that the verdicts are not supported by substantial evidence. Despite the lack of an appendix as provided by our rule 16, we have referred to the voluminous transcript of proceedings and find that there is such proof and evidence.

On this appeal, the evidence is to be viewed in a light most favorable to the government. *United States* v. *Micele,* 7 Cir., 327 F. 2d 222, 224 (1964). So viewed, the evidence was sufficient to support the verdicts of the jury.

No formal agreement is necessary to constitute a conspiracy; such an agreement may be inferred from the facts appearing in the evidence. A common design is the essence of conspiracy. *United States* v. *Zuideveld,* 7 Cir., 316 F. 2d 873, 878 (1963), cert. den. 376 U.S. 916.

6. We believe that the district court properly submitted to the jury two forms of verdicts as to Cudia and two as to Turner. As to each defendant there was a form finding him guilty and a form finding him not guilty. The jury signed the form as to each defendant which read "We, the jury, find defendant [here the name of a defendant was entered] guilty". There was no error here.

For these reasons the judgments from which this appeal was taken are affirmed.

JUDGMENTS AFFIRMED.

C.

Judgment

In the United States Court of Appeals For the Seventh Circuit

Chicago, Illinois 60610

Tuesday, May 18, 1965

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 14857 v.

JOSEPH H. CUDIA and
JOHN TURNER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

D.

Order Denying Petition for Rehearing

In the United States Court of Appeals For the Seventh Circuit

Chicago, Illinois 60610

Tuesday, June 15, 1965

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee

No. 14857 v.

JOSEPH H. CUDIA and
JOHN TURNER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing, filed by appellants herein, be, and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 343

JOSEPH H. CUDIA AND JOHN TURNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 346 F. 2d 227.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1965. A petition for rehearing was denied on June 15, 1965. The petition for a writ of certiorari was filed on July 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment stated an offense.

2. Whether the motion for a bill of particulars was properly denied.

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3. Whether petitioners were entitled to a list of the government's witnesses.

4. Whether evidence seized without a warrant should have been suppressed.

5. Whether petitioners were afforded a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to violate internal revenue laws governing the manufacture of intoxicating liquor (18 U.S.C. 371; 26 U.S.C. 5601, 5602). Each petitioner was sentenced to imprisonment for five years (the sentences required each petitioner to serve the first six months of the term and thereafter placed him on probation) and to a fine of $1,000 (R. 5–6, 57–58). The court of appeals affirmed.

The government's evidence showed that, on April 6, 1963, at about 1:00 or 2:00 a.m., a detective in the office of the sheriff of Winnebago County, Illinois, telephoned petitioner Cudia at his home, requesting him to accompany officers to a building which he owned in Rockford.[1] Cudia voluntarily went with the officers to the building which he said was rented to a Negro man who had given the name of Scott

[1] Cudia, who testified in his own behalf, described the premises as a large triangular tract lying next to the railroad in an outlying district of Rockford. On it was a large old residence, which Cudia had converted into four apartments. About one hundred ten feet distant was a frame structure consisting of two stories and a basement, sometimes referred to in the evidence as a barn but which had originally been ancillary to a greenhouse, now torn down (Tr. 593–598).

Dullard and who had said that he was from Chicago. Cudia said that the tenant had not paid his month's rent in advance and gave his permission for the officers to enter. Cudia himself attempted unsuccessfully to force the door, which was ultimately opened by the officers. Cudia entered first and turned on the lights, followed by the officers. The basement of the building was found to contain a still, consisting of a 55-gallon drum packed with asbestos over four burners, with pipes leading to a cooling barrel and a receptacle. The still was warm but was not in operation. The officers also found twenty gallons of moonshine whiskey and a large quantity of whiskey mash (Tr. 137–157, 198–202, 207–216). There was no sign to indicate registration of the still (Tr. 166).

Cudia denied knowledge of the still. One officer testified that Cudia said that he had done some wiring on the building and had run the gas line to the building (Tr. 169, 213). The officers found two empty and two partly filled sacks of Grant-Wilson 507 asbestos cement, forty cartons, each containing four one-gallon glass jugs, and some copper tubing. Cudia took the tubing and some tools upstairs, saying that they were his. He said that he helped to carry in some of the drums, but that they did not belong to him. Cudia also said that he did not know how anybody got in the part of the building where the glass jugs were, as he had the key to that portion of the building, which was separated by a partition (Tr. 162–164, 169). In the yard was a 500-gallon drum of propane gas, with a copper tubing line leading to the

building and to the burner under the still (Tr. 165).[2]

The evidence showed the following additional facts tending to connect petitioners with the still. On March 7, 1963, Cudia purchased a sixty-foot coil of 3/8" copper tubing, a sixty-foot coil of "Type L" tubing and a number of small items from Mott Brothers Co., a concern in Rockford (Tr. 277–278). On March 12, Cudia and a Negro man bought two 100-pound tanks of propane gas from Mitchell Radio and Appliance Co. in Rockford. Cudia said that the gas was for heating water and cooking in a restaurant. While the two Mitchell employees who sold the gas to Cudia did not identify Turner as being the Negro man with him, one thought Turner "favored" a photograph he had previously identified (Tr. 115–135, 384–402). Cudia said that future deliveries would be to Box 338 Cunningham Road and gave directions to get there. On March 20, payment was made to the Mitchell company for a 100-pound can of propane gas to be delivered to the Cunningham Road address. The following day, a Negro man who identified himself as "Phil" of "Phil's Restaurant" cancelled the order and received a cash refund for which he signed as "Phil Jones" (Tr. 405–414).

On March 21, Cudia bought two fifty-pound bags of Grant-Wilson 507 asbestos cement from Mott Brothers and duplicated this purchase on March 28. Mott

[2] On April 10, 1963, a Treasury agent talked with Cudia at his home. Cudia said that in March he had rented the basement of the building for $50 to a man named Scott Dullard for the storing of merchandise. Cudia also said that he had helped take two fifty-gallon steel drums into the basement.

Brothers was the only franchised dealer for this cement in Rockford. The sales to Cudia were the only sales made between December 31, 1962, and April 23, 1963 (Tr. 273, 277, 296–303).

On March 21, 1963, after a telephone call from a one-family residence, where the rent was paid by petitioner Turner, to the Skelgas Division of Skelly Oil Co. at Beloit, Wisconsin (Tr. 372–381, 310–311), a delivery was made to the intersection of Pierpont and Cunningham in Rockford, Illinois, of a 500 gallon tank for propane gas containing as much gas as the law permitted to be carried in the tank. A Negro man in a green Cadillac, recognized as being six or seven years old, met the delivery, signed a receipt in a name that appeared to be "Art Thomas" and directed the driver to Box 338, Cunningham Road, where the installation was made. The bill for filling the tank was paid on April 8 by a male Negro (Tr. 313–325). On April 11, the Skelgas company received a call from a man who identified himself as Turner. The manager testified that his recollection was refreshed by his previous statement that the person calling said "they are bringing me up for identification. You do not know me or recognize me." (Tr. 327–331). A Negro was subsequently brought to the office, but the manager was unable to identify him (Tr. 332). Asked whether Turner was the man who received delivery, the manager said, "I am not sure. I don't know." (Tr. 335–341). It was shown that on February 2, 1963, a 1953 green Cadillac was sold to petitioner Turner and that he signed the papers

(Tr. 345–348). A government handwriting expert testified that the signature of "Art Thomas" on the delivery slip for the 500-gallon propane gas tank, the signature "Phil Jones" on the return receipt for the 100-pound gas tank to the Mitchell company, and the signature of petitioner Turner on the used car papers and other documents were all made by the same person (Tr. 487–507).

There was no testimony on behalf of Turner. Testifying in his own behalf, Cudia explained his actions as follows. He stated that he bought the two bags of asbestos from Mott Brothers to use on top of one of the two furnaces at his home. About two weeks later he bought two more bags and put them on top of his second furnace (Tr. 649, 654, 666, 761, 705–706). He bought the 3/8" copper tubing for use at home, but did not do the work and had it stored in his truck. He produced a coil of tubing which he said was the one purchased (Tr. 666–668). His purchase of two 100-gallon tanks of propane gas from the Mitchell Company was occasioned by negotiations with a Negro man, who gave his name as Phil Jones, and said he was from Chicago, to rent the second floor of the building where the still was found as a restaurant. Cudia stated that, although he promised to make improvements upon Jones' statement that he (Jones) would pay three months' rent in advance, he ran into difficulties about tearing down a condemned house and was unable to make the promised changes. Jones called him, expressing his disappointment, and Cudia never heard from him again (Tr. 608–615).

Cudia further testified that another Negro who gave the name of Scott Dullard, and who also said that he was from Chicago, approached Cudia wanting a place in which to store merchandise. Cudia agreed to rent the first floor and basement of the building where the still was found to him for fifty dollars a month. Cudia said that he knew nothing of the still and that he had given his consent for the search (Tr. 617–620). He said that he barely knew Turner and had never seen him around the property (Tr. 668–686).

ARGUMENT

1. The indictment adequately stated an offense. It charged that between March 7 and April 6, 1963, in the Northern District of Illinois, petitioners conspired to have in their possession and control an unregistered still, to carry on the business of unbonded distiller, to make and ferment mash fit for the production of distilled spirits on unauthorized premises, and to defraud the United States of taxes due on distilled spirits, specifying the statutes violated as to each of these. The overt acts alleged as to Cudia related to the purchase of materials for the operation of a still, while the act alleged as to Turner related to his signing under a false name a receipt for a 500-pound propane gas tank (R. 5–6). It is not necessary that the overt acts be in themselves criminal, only that they be in furtherance of the conspiracy. *Yates* v. *United States,* 354 U.S. 298, 334.

2. The trial court did not abuse its discretion in denying Turner's motion for a bill of particulars. This motion requested (1) the names of all parties

to the conspiracy, (2) the dates and places of the alleged conspiracy and (3) the acts and declarations of the parties in furtherance of the alleged conspiracy (R. 18). The information requested by (1) and (2) appeared in the indictment. As to (3), such details of evidence need not be given. *Wong Tai* v. *United States*, 273 U.S. 77, 82–83.

Petitioner Turner also sought by pre-trial motion a complete list of the government witnesses (R. 30). Such information is required to be given only where the charge is treason or a capital offense. 18 U.S.C. 3432.

3. Only Turner moved to suppress the evidence in the court below. Cudia could not, in any event, complain of the search because of his admitted voluntary consent thereto. It is here urged that Cudia could not validly give consent for the search because the relationship between Cudia and Turner was that of landlord and tenant. Turner, however, did not claim that he was a tenant of the premises and the government's position, sustained by the jury's verdict, was that the petitioners were engaged in a conspiracy to operate the still. As a co-conspirator with at least an equal right to possession of the premises, Cudia could validly give permission to search. See *United States* v. *Sferas*, 210 F. 2d 69, 74 (C.A. 7), certiorari denied *sub nom. Skally* v. *United States*, 347 U.S. 935; *Roberts* v. *United States*, 332 F. 2d 892 (C.A. 8).

4. Petitioners' contention that they did not receive a fair trial is centered upon the claimed insufficiency of the evidence. As the Statement, *supra*, pp. 2–7,

shows, however, the circumstantial inference of guilt as to both petitioners was substantial. Cudia, for example, owned the premises and was directly tied to the purchase of much of the equipment found at the still while Turner was directly implicated through his signature on the receipt for the propane tank and the circumstances under which the tank was ordered and delivered. Finally, the written statement which state officers obtained from Cudia was introduced in evidence by Cudia rather than by the government (Tr. 223–226).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 343

JOSEPH H. CUDIA and JOHN TURNER,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing.

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JOSEPH H. CUDIA and JOHN TURNER,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph H. Cudia and John Turner, pray that this Court grant a rehearing of its order of December 13, 1965, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case as prayed in the petition filed on July 13, 1965, herein.

Questions Not Previously Presented.

1. Whether the Act of Congress relating to conspiracy is unconstitutional.

2. Whether Section 5601 (a) of Title 26 U. S. C. is unconstitutional.

3. Whether a criminal intent is an essential element of the offense of conspiracy.

4. Whether evidence of a pretrial statement of an accused elicited before indictment in violation of his constitutional right to counsel and to remain silent is admissible.

5. Whether comment by a prosecutor on the failure of an accused to testify in a criminal case violates the Fifth Amendment to the Constitution of the United States.

6. Whether a charge of conspiracy is merged in the substantive offense upon its commission.

Reasons for Granting Rehearing and Writ.

1. The Act of Congress relating to conspiracy is unconstitutional.

Section 371 of Title 18 U. S. C. provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The offense of conspiracy is generally recognized as an inchoate offense because it is preliminary to another and more serious principal offense. This necessarily involves tedious questions common to all inchoate offenses: (1) When does mere preparation (which is not a criminal offense) cease, and commission of the inchoate offense begin? (2) When is the commission of the inchoate offense complete? (3) When does the commission of the principal offense begin? (4) What intent element is required for commission of the inchoate offense as distinguished from the intent element necessary to the commission of the principal offense?

Surely, the provisions of the Act of Congress were not drafted with these very difficult questions in mind. Since answers to the first three questions depend upon,

and will vary according to the particular facts in each case, no attempt was made to spell out in detail where preparation ceases and commission begins, or where the commission of the inchoate offense ends and the commission of the principal offense begins. The provisions of a statute should not attempt to cover every possible fact variation, but they should specify clear guide-lines so that the offense can be positively identified in all possible circumstances. This requires a more specific enunciation of intent element in the offense than is now ascertainable from the existing Act of Congress.

The intent element in conspiracy has often proved elusive and difficult to identify because of the intent element involved in the principal offense which is the object of the conspiracy. (See Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941)). However, the very nature of the offense requires an intent separate and distinct from the intent required in a prosecution for the principal offense which is the object of the conspiracy. Since an agreement (by words, acts or understanding) is required, there must be (1) an intent to agree. And, the agreement must be accomplished with (2) an intent that the offense which is the object of the agreement be committed. If the inchoate nature of conspiracy is kept in mind, the provision when drafted should be sufficiently clear.

There are certain elements of the offense of conspiracy. A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. However, no person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

The offense of conspiracy must be set forth with sufficient definiteness and certainty in a statute to satisfy constitutional requirements. The Act of Congress is vague, indefinite and uncertain. It is repugnant to the Constitution of the United States. It should be so declared by this Court.

2. Section 5601 (a) of Title 26 U. S. C. is unconstitutional.

Although the Act of Congress has long been considered to be constitutional, it has not been so held by this Court.

It is suggested that it should be considered in light of *United States* v. *Romano*, ... U.S. ....., 15 L. ed. 2d 210, 86 S. Ct. 279, which was decided on November 22, 1965.

3. A criminal intent is an essential element of the offense of conspiracy.

The gist of the offense of conspiracy is an agreement between two or more persons to commit an offense, attended by an act of one or more of them to effect the object of the conspiracy. (*United States* v. *Falcone*, 311 U.S. 205, 85 L. ed. 128, 61 S. Ct. 204. See, also, *Tabor* v. *United States* (C.C.A.Md. 1945), 152 F. 2d 254.)

An intent to commit an offense is essential. (*Salas* v. *United States* (N.Y. 1916), 234 F. 842.)

Mere knowledge, acquiescence or approval of the object of a conspiracy, without an intention and agreement to cooperate in the offense, is not sufficient to constitute one a party to a conspiracy. (*Dennis* v. *United States* (C.A.Colo. 1962), 302 F. 2d 5, *Cleaver* v. *United States* (C.A.Colo. 1956), 238 F. 2d 766, *Thomas* v. *United States* (10 Cir.), 57 F. 2d 1039.)

A conspiracy also cannot be committed by a single person acting alone; he must act in concert with another person. (*Herman* v. *United States* (C.A.Fla. 1961), 289 F. 2d 362, certiorari denied 368 U.S. 897, 7 L. ed. 2d 93, 82 S. Ct. 174.)

Here, it is charged in the indictment that petitioner, John Turner, on March 23, 1963, signed the name, Art Turner, to a certain receipt of Skelly Oil Company for a 500-gallon gas tank which its manager, Roy Schroeder, delivered to a building at another location (R. 315), but the person that signed the receipt did not accompany him there. (R. 334.) He was not sure of the identity of the person that signed the receipt. (R. 335.)

Howard C. Doulder, an examiner of questioned documents (R. 487), but employed by the government, testified that he made an examination and comparison of the questioned signature Art Turner with the known handwriting of John Turner and it was his opinion that they were the handwriting of one and the same person. (R. 507.)

Petitioner, Joseph H. Cudia, testified that he did not conspire with Mr. Turner to commit any offense against the United States. (R. 666.) He also testified that he had not requested or solicited him to obtain a 500-gallon gas tank. He knew nothing about it. (R. 687.)

No testimony was introduced by the prosecution to show that petitioners conspired together to commit any offense against the United States. Petitioners were not shown to have been at the time and place where, and at the time when, a still and distilling apparatus was set up without being registered, or the business of a distiller

was engaged in or carried on, or where mash and ferment mash fit for distillation was made, or distilled spirits produced.

Although the site or place had been under surveillance by the state law enforcement officers for several weeks, there is absolutely no testimony that petitioners had been there.

A person does not become liable as a conspirator unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge, commits some act in furtherance thereof. (*Jones* v. *United States* (C.A.Okl. 1958), 251 F. 2d 288, certiorari denied 356 U.S. 919, 2 L. ed. 2d 715, 78 S. Ct. 703.) The charge of conspiracy to commit an offense against the United States has implicit in it elements of knowledge and intent. (*Schnautz* v. *United States* (C.A.Tex. 1959), 263 F. 2d 525, certiorari denied 360 U.S. 910, 3 L. ed. 2d 1260. 79 S. Ct. 1294.)

Knowledge and intent are both lacking in the Act of Congress and in the evidence. Mere suspicion is not enough. (*United States* v. *Newton* (D.C.), 52 F. 275.)

The motions for acquittal should have been granted by the trial court. It is reversible error.

There was a denial of due process of law.

4. Evidence of a pretrial statement of an accused elicited before indictment in violation of his constitutional right to counsel and to remain silent is not admissible.

Petitioner, Joseph H. Cudia, had been arrested by certain state law enforcement officers without a warrant. He was taken to the court house where he was inter-

rogated by them. (R. 223.) He made a statement. The statement elicited from him during the accusatory interrogation was introduced by the Government at the trial. (R. 261.) Objection was made by petitioners, but it was admitted in evidence. It was heard by the jury.

It appears from the record,

1. He had been arrested by certain state law enforcement officers but he was not taken before a judge or magistrate.

2. He was surrounded by hostile forces.

3. He was not fully and completely advised of his constitutional rights.

4. He was not advised of his right to the assistance of counsel.

5. He was not warned of his absolute right to remain silent.

An incriminating statement elicited by state law enforcement officers during the accusatory interrogation of an accused may not be used against him at his trial. (*Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758, *Massiah* v. *United States,* 377 U.S. 201, 12 L. ed. 2d 246, 84 S. Ct. 1119.) The improper introduction of the statement which was obtained in violation of his constitutional rights compels reversal. The trial court should not have admitted the same.

Again, here was a denial of due process of law.

5. Comment by a prosecutor on the failure of an accused to testify in a criminal case violates the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." To protect this right an Act of Congress has declared that the failure of a defendant to testify in his defense "shall not create any presumption against him." (18 U. S. C. Sec. 3481.)

In *Griffin* v. *State of California,* 380 U.S. 609, 14 L. ed. 2d 106, 85 S. Ct. 1229, the Court said that "the Fifth Amendment, in its direct application to the federal government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (See *Stewart* v. *United States,* 366 U.S. 1, 6 L. ed. 2d 84, 81 S. Ct. 941.)

Here, in his opening argument to the jury, the prosecutor commented on the failure of petitioner, John Turner, to testify. (R. 921.)

It is reversible error.

6. A charge of conspiracy is merged in the substantive offense upon its commission.

Where the object of a conspiracy is to commit an offense of a higher grade, and the object is accomplished, as in this case, a prosecution for conspiracy cannot be maintained, because the lesser offense is merged in the greater. (*United States* v. *Gardner* (C.C.N.Y. 1890), 42 F. 829. See, also, *United States* v. *Fischer* (D.C.Pa. 1917), 245 F. 477.)

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 (2) of this Court.

John R. Snively,

Counsel for Petitioners.